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700749—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 109

MERCHANTS AND MANUFACTURERS ASSOCIATION OF LOS ANGELES, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The original opinions of the court below (R. XXII, 10064–10083) are reported at 151 F. 2d 483. The memorandum opinions of the court, on cross petitions for rehearing (R. XXII, 10089–10091), are reported at 151 F. 2d 490. The opinion and order of the court amending its original opinion by ordering enforcement of the Board's order in full (R. XXII, 10091–10094) is reported at 154 F. 2d 108. The findings of fact, conclusions of law, and order of the National Labor Re-

lations Board (R. III, 1155–1243) are reported at 37 N. L. R. B. 50.

JURISDICTION

The decree of the court below was entered on August 30, 1945 (R. XXII, 10083–10089). Petitions for rehearing, filed by the petitioner and the Board, were denied on December 28, 1945 (R. XXII, 10089–10091). The decree was modified so as to enforce the Board's order in full by an order of the court filed on March 2, 1946 (R. XXII, 10091–10094). The petition for a writ of certiorari was filed on May 17, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the order of the National Labor Relations Board was based on evidence and findings irrelevant to the issues tendered by the complaint.

2. Whether there is substantial evidence to support the findings of the Board in the instant case:

(a) that the petitioner, an association of employers, acted in the interest of its member employers and was accordingly an employer within the meaning of Section 2 (2) of the Act,[1]

[1] The question presented by petitioner (Pet. 10), whether it is engaged in commerce within the meaning of the Act, is not involved in this case. Under Section 10 (a) of the

(b) that the association of employers engaged in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act, and

(c) that the unfair labor practices found to have been committed by the association of employers were an integral part of a coordinated scheme or plan by the association of employers to assist all employers of Southern California in interfering with employee rights guaranteed by the Act, that such plan if again applied would inevitably bring about further violations of the Act, and that it was therefore necessary to prevent the commission of similar unfair labor practices by the association of employers acting in the interest of any employer.

3. If the answer to question 2 is "yes", whether the Board may properly order the association of employers:

(a) to cease and desist from dominating, interfering with, or supporting any labor organization among the employees of any employer,

(b) to cease and desist from soliciting and collecting funds from any employer to be used for the purpose of interfering with the rights guaranteed in Section 7 of the Act, and

(c) to cease and desist from in any other manner interfering with, restraining, or coercing the

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National Labor Relations Act, Appendix, *infra*, p. 29, the Board need only find, as it did (R. III, 1232–1233, that petitioner's unfair labor practices affected commerce.

employees of any employer in the exercise of the rights guaranteed in Section 7 of the Act.

4. Whether the provisions of the order set forth in question 3 (b) deny to petitioner its constitutional right of free speech.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 28–30.

STATEMENT

On charges duly filed (R. I, 1–46), the Board, on September 26, 1939, issued its complaint against the ten following respondents (R. I, 53–79): Sun Tent-Luebbert Company, Mellus Brothers and Company, Inc., Downie Brothers, Inc., and United Tent and Awning Company, Ltd. (which four companies are herein referred to as the Canvas Companies); Southern Californians, Inc., The Neutral Thousands, Inc., herein called TNT, G. L. Huff and Clay C. Rittenhouse, doing business as Employees Advisory Service, and Merchants and Manufacturers Association of Los Angeles, herein called M&M (which five respondents are collectively referred to herein as the institutional parties); and California Canvas Jobbers Club. The Board subsequently dismissed the complaint against the last named respondent (R. III, 1243) and it is not further referred to herein.

The Board's complaint alleged, *inter alia,* that the Canvas Companies were engaged in the manufacture and distribution of canvas goods in interstate commerce (R. I, 54–55, pars. 1–2); that petitioner, M&M, was an organization generally engaged in forming employer-dominated unions and in otherwise denying to employees of its members the rights guaranteed under the Act (R. I, 63–65, par. 7); that M&M and the other institutional parties had acted on behalf of the Canvas Companies in regard to the employment of workers and that they were employers within the meaning of Section 2 (2) of the Act (R. I, 65, par. 8); that all of the respondents including M&M, acting together, on and after December 2, 1937, had instigated and formed a labor organization, referred to herein as the Independent, and had dominated and interfered with its formation and administration by certain specified acts, in violation of Section 8 (2) of the Act (R. I, 66–69, par. 10); that certain contracts entered into with the Independent were a result of the unfair labor practices above set forth and that they were entered into as part of a plan of interference with the rights of the Canvas Companies' employees under the Act (R. I, 69–70, par. 11); that by the acts described above, respondents had violated Section 8 (1) of the Act (R. I, 70, par. 12); that the Canvas Companies, through the institutional parties, prior to and since December 2, 1937, had engaged in a plan

of interference with the self-organization of their employees, consisting of certain specified acts, and that by these acts all respondents had interfered with the statutory rights of the Canvas Companies' employees, in violation of Section 8 (1) of the Act (R. I, 70–75, par. 13); and that the acts of the institutional parties and the Canvas Companies in violation of Section 8 (1) and (2) of the Act, as set forth, *inter alia,* in paragraphs 10 to 13, summarily described above, *supra,* pp. 5–6, taken together with the operations of M&M and the other institutional parties as set forth, *inter alia,* in paragraphs 7 and 8, summarily described above, *supra,* p. 5, had a close, intimate, and substantial relation to interstate commerce and had led and tended to lead to labor disputes burdening commerce (R. I, 77–78, par. 19).

Answers to the complaint were filed by the various respondents (R. I, 83–145). The answer of petitioner M&M (R. I, 93–100) specifically denied the allegations of paragraph 7 of the complaint and all the other allegations described above except those with respect to the nature of the operations of the Canvas Companies.

After further appropriate proceedings, the Board on November 29, 1941, issued its findings of fact, conclusions of law, and order (R. III, 1155–1243). Insofar as relevant to the questions raised by the petition for certiorari, the findings and

supporting evidence may be summarized as follows:[2]

The four Canvas Companies are engaged at their plants at Los Angeles, California, in the manufacture and distribution of tents, out-door furniture, and other canvas goods; they cause substantial amounts of raw material and finished products to move in interstate commerce (R. III, 1162–1164; VII, 3184–3186, IX, 4029–4032, 4100–4103, 4231–4234, XVI, 7804–7805, I, 231–232, VIII, 3470–3471). Southern Californians, Inc., is a non-profit corporation with membership limited to persons and firms in California (R. III, 1164–1165; VI, 2620–2626, 2738–2755, XVII, 7926–7931). TNT is a non-profit California corporation with membership limited to women, and was incorporated "exclusively for educational purposes" (R. III, 1165–1166; VI, 2469, 2482–2483, VII, 3127–3142). Employees Advisory Service is a partnership consisting of Glancy L. Huff and Clay C. Rittenhouse, supported by and operated under supervision of Southern Californians, Inc. (R. III, 1166; I, 85, V, 2329–2330, 2344–2345, XIV, 6532–6533). M & M is a California corporation admitting to membership any person or enterprise engaging in any business requiring employment of labor (R. III, 1166–1167; XI, 5317–5334).

[2] In the following statement, the references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

Unions affiliated with the American Federation of Labor and the Congress of Industrial Organizations began to organize the Canvas Companies' employees during 1937 (R. III, 1167–1168; IV, 1674–1677, V, 1953–1954, 2096–2099, VII, 3199–3200, 3203–3204, 3401–3403, VIII, 3587–3588, 3711, 3886–3887, XIII, 5932–5934, 5938), and these organizational activities were known to officials of the Canvas Companies (R. III, 1168; VII, 3190–3194, 3226, 3231–3234, 3400–3401, VIII, 3583–3586, 3725–3726, IX, 3980). During November, 1937, Factory Superintendent Everson selected three employees at Mellus Brothers who met with two or three supervisory and non-supervisory employees from each of the other Canvas Companies; the meeting took place in the Mellus plant and on company time (R. III, 1169, 1170; IV, 1547–1563, V, 1957–1958, 2019–2020, VII, 3026–3029, VIII, 3877–3882, XI, 4910–4913, 4930–4933, XII, 5791–5798, XIII, 5931–5933, 6299–6307). Superintendent Everson introduced Rittenhouse and Huff who urged formation of an "independent" union (R. III, 1170; IV, 1559, 1564, V, 1946–1947, VII, 3030, XI, 4915–4918, XIII, 6303–6305, 6309–6320). When the employees raised the then pressing problem of a disparity in the wages paid at the four plants, Rittenhouse assured them that this could be corrected through a contract with an "independent" union (R. III, 1170; XIII, 6310–6311). Similar assurances by Rittenhouse were

given at two subsequent meetings, one at the Mellus plant and one at TNT headquarters; two of these meetings, together lasting for three and one-half hours of working time, were attended by a committee of employees without loss of pay (R. III, 1170, 1171; IV, 1569–1570, XI, 4919–4921, XIII, 5935–5936, 6323–6326, 6330–6332). The meeting at TNT headquarters, on Rittenhouse's suggestion, adjourned to the office of an attorney whom the committee retained (R. III, 1171; IV, 1569–1571, XI, 4945, XIII, 6331–6337). Three days later, the attorney filed articles of incorporation signed by the employees' committee (R. III, 1171–1172; IV, 1571, 1644–1656, 1782–1792).

Meanwhile, membership cards were supplied by Rittenhouse or Huff, and a membership campaign was conducted at the four Canvas Companies' plants during working hours and with the active assistance of supervisory employees (R. III, 1172–1173; IV, 1573, 1588, 1614, 1619–1620, 1622–1623, 1792–1793, 1880–1881, 1916–1918, V, 1959–1963, 1966–1968, 2162–2165, VII, 3020–3031, 3050–3051, 3284, VIII, 3884–3885, IX, 3984, XII, 5791–5794, 5797–5799, 5804–5806, 5819, XIII, 5931–5933, 6000–6001).

At the first meeting of the Independent after incorporation, the officers who were elected included several supervisory employees (R. III, 1173; IV, 1539, 1609, 1886, 1932–1933, VII, 3026–

3027, 3030–3031, XIII, 5937–5938). On January 11, 1938, when representatives of the Independent met for the first time with representatives of the Canvas Companies, the Independent's claim that it represented a majority of the employees was accepted by the Canvas Companies without question (R. III, 1173–1174; IV, 1797–1799, VII, 3234–3236, VII, 3425–3428, 3598–3601, IX, 3931–3932, 4149–4152). After further negotiations, in which Huff played an active part, a contract was executed on February 7, 1938 (R. III, 1174–1175; IV, 1795–1799, 1857–1859, 1869–1877, V, 2042–2043, XI, 4901–4906, 4966–4968, 4974–4976). Although some of the contract provisions relating to working conditions were thereafter not strictly enforced (R. III, 1176–1177; V, 2151–2152), the limited preferential hiring provisions of the contract (IV, 1870, 1874) were strictly enforced and were indeed expanded to assure to the Independent an even greater degree of security than was called for by the contract terms (R. III, 1176–1177; IV, 1591–1592, 1615–1618, V, 2177, IX, 4173, 4187–4188, XI, 5031–5032).

The Independent met without cost at the offices of TNT and was guided largely by Huff who prepared its minute books and directed its meetings (R. III, 1176; IV, 1637–1642, 1674, 1679–1680, V, 2061–2062, 2177, VIII, 3447–3448, 3888, XI, 4927–4928, 4961–4968, 5112–5113, XII, 5425, XV, 7012–7014). In addition, Huff actively campaigned to

defeat efforts of outside unions to displace the Independent (R. III, 1177–1178; VIII, 3636–3638, 3720–3721, 3895–3896, XII, 5807–5808, XIII, 5951–5954). He also assumed the dual role of "business agent" for the Independent and "impartial party" for the employers and the Independent (R. III, 1173; IV, 1669–1672, VIII, 3894–3895, IX, 4166–4167, XI, 4898–4901, 4926–4927, 5062).

The Board found that the formation and administration of the Independent as described above was a joint effort of all the respondents and was an integral part of a general scheme or plan of all the institutional parties to lend their services to employers in effectuating the so-called "open shop" program throughout Southern California (R. III, 1224). In making this finding and in evaluating the evidence regarding the part played by M&M and the other institutional parties in the formation of the Independent, the Board took into consideration the industrial relations activities of the institutional parties in other industries (R. III, 1227).

Thus, the Board found that in 1936 and thereafter, M&M repeatedly put itself on record as supporting the "open shop" (R. III, 1204–1205; XI, 5363–5364, XIV, 6849–6852, XX, 9433–9448), and that the activities of M&M during this period showed that its "open shop" policy was designed to cover a deliberate anti-union policy (R. III,

1205). Among other things, M&M engaged in a propaganda campaign against unions and exhorted employers to deal only with their own employees (R. III, 1205–1206; XIX, 9002–9004, XX, 9433–9448, XXI, 9829–9833); it participated actively in the formation of trade associations whose members pledged themselves by contract to adhere to certain anti-union policies (R. III, 1206; XIV, 6711, 6714, 6735–6748, 6767–6780, 6810–6814, 6836–6838, 6844, 6850–6851, 6857–6858, XIX, 9318–9319); it provided strike-breaking services to M&M members (R. III, 1206; XIV, 6784–6786, XV, 6871–6872, XIX, 9292–9294, XX, 9425–9428, 9433, 9437–9439, 9442); and it maintained a free employment service for non-union employees (R. III, 1206–1207; XII, 5615–5616, 5726–5728, XVII, 8827–8833).

In August 1937, a representative of M&M arranged with Rittenhouse and Huff to refer to them employer requests for formation of unaffiliated unions, and Rittenhouse and Huff fulfilled several such assignments in the ensuing months (R. III, 1197; X, 4827–4840, 4851–4859, XIII, 6051–6059, 6069–6082, 6098, 6151–6185, 6208–6216, XV, 7229–7230, XVII, 8016–8019, 8121, 8125). TNT was incorporated on October 2, 1937, and Rittenhouse and Huff joined its staff on November 1, 1937, to devote themselves exclusively to forming "independents" (R. III, 1165, 1194, 1195; IX, 4280–4286, X, 4814–4815,

XIII, 6199–6200, XIV, 6665). Their formation of various such "independents" in different industries was coordinated by M&M chiefly through Harold Ryerson, an employee of M&M, who told them which companies to organize and gave them lists of "key" employees designated by the employer and Ryerson as reliable (R. III, 1195, 1197, 1198, 1199; VI, 2526–2528, XI, 5246–5247, XII, 5427–5432, 5611–5612, XII, 6165, 6344–6345, 6350–6358, XIV, 6649–6654, XV, 7126–7132, XVII, 8697–8698, 8727, XIX, 8941–8949, 9154–9156, XXI, 9747–9756, 9808–9810). The TNT formula generally called for rapid establishment of unaffiliated unions when outside organization was threatened, for careful supervision of such unions by TNT, and for restriction of their activities to social affairs so far as possible (R. III, 1197–1204; IX, 4326–4344, XIII, 6090–6098, XVII, 8086–8102, XXI, 9809). TNT also supported the "open shop" formula of M&M by extensive publicity activities (R. III, 1207; IV, 1685–1689, 1701–1705, 1742–1782).

Southern Californians, Inc. also participated in the formation and control of the Independent (R. III, 1220). It served as a "Community Chest for labor problems, and to coordinate the efforts of all existing employer groups" (R. III, 1211; XIX, 9019). As such, it contributed substantially to the support of M&M and, through interlocking leadership and careful coordination, it arranged

with that organization a systematic division of tasks (R. III, 1211–1214; VI, 2514–2515, 2552–2584, 2657–2664, 2676–2694, VII, 2972–2977, XII, 5862–5866, XIII, 5900–5901, 6020–6029, 6042–6045, XIV, 6706–6710, XV, 7224, XIX, 8907–8917, 8952–8956, 9019, 9086–9088). In addition, substantially all the activities of TNT were financed by Southern Californians, the total subsidy coming to $87,000 (R. III, 1212, 1214; VI, 2633–2640, 2883–2884, VII, 2966, 3119–3121, 3143–3144, IX, 4297–4298, X, 4557, 4560, XIII, 5901–5902). The use which TNT made of Southern Californians' funds was closely supervised by Southern Californians and checked by repeated investigations of TNT activities (R. III, 1214–1220; V, 2201–2213, 2224–2227, 2244–2246, 2285–2293, 2301, 2410–2411, VI, 2518–2519, 2529, 2585–2587, 2640–2644, 2650–2655, IX, 4297– 4298, 4302–4305, X, 4441–4444, 4611–4618, XI, 5073–5085). After TNT was abandoned in March 1939, Southern Californians continued to direct the "independent" organizing activities of Rittenhouse and Huff in their new venture, Employees Advisory Service, which was completely subsidized by Southern Californians (R. III, 1219–1222; I, 85, V, 2328–2336, 2344–2346, 2351–2352, 2356, 2413–2415, VII, 3021–3024, IX, 4306–4308, XI, 5113–5116, 5121–5126, 5128–5141, 5171–5177, 5213, XIV, 6531–6538, 6617–6620, XVII, 7933–7934).

This was the general pattern; the launching of

the Independent, as described above (pp. 8–11), completely conformed to this pattern. Mellus Brothers was a member of M&M for many years before 1937 and the other three Canvas Companies joined that organization on December 1, 1937, to help keep Los Angeles an "open shop town" (R. III, 1186–1187; VI, 2510–2512, VII, 3262, VIII, 3646, 3704–3707, IX, 4110, 4141, 4221–4223). Prior to that time, and about a month before emergence of the Independent, a representative of M&M met with officers of the Canvas Companies (R. III, 1186; VII, 3267–3274, 3281–3282, VIII, 3442–3445, 3646–3647, 3662–3665, IX, 3954–3960, 4147, 4223–4226, XI, 5378–5379). In May 1938, the four companies joined Southern Californians and thereafter paid dues to it, in "gratitude for the work done for them" (R. III, 1193, 1209–1210; VI, 2695–2702, VII, 2949–2954, 3163–3165, 3292–3293, IX, 4018–4023, 4050–4051, 4201–4215, XI, 4995–4997, XII, 5408–5409); as shown above (p. 14), at this very time Southern Californians was subsidizing TNT, which in turn, through its employees, Rittenhouse and Huff, was sponsoring and maintaining the Independent which they had organized among the Canvas Companies' employees. The activity of Rittenhouse and Huff at the Canvas Companies was undertaken pursuant to instructions given them at the offices of TNT by M&M's Ryerson, and the persons with whom they communicated at the plants were those named

by Ryerson (R. III, 1179–1180; XI, 4928–4933, XIII, 6226–6239, 6267–6275, 6279, 6286–6289, XV, 7127, 7144, 7254–7256). Rittenhouse and Huff reported on their activities to Ryerson, and through their reports were able to arrange with the companies the basis for the assurances later given to the employees (*supra,* p. 8) that the wage disparity would be ironed out in a contract with an "independent" union (R. III, 1180–1181; XIII, 6289–6290, 6323–6326, 6339–6340, XV, 7125–7127). Even the Independent's attorney (*supra,* p. 9) was designated by Ryerson (R. III, 1181; XIII, 6332). Documentary evidence from TNT's files plainly reveals the coordinated activities which led to the formation of the Independent (R. III, 1192–1193; XVII, 8014–8015, 8093–8097, 8108–8111).

On all these facts, the Board concluded (R. III, 1223–1228) that the Independent came into being as the joint effort of the Canvas Companies and the institutional parties and as an integral part of a general scheme or plan of the institutional parties to effectuate the "open shop" program throughout Southern California (R. III, 1224); that the Canvas Companies, in order to defeat the current A. F. L. and C. I. O. organizing campaigns, turned to and became members of M&M and adopted the M&M and TNT formula which called for the establishment of an unaffiliated union among their employees (R. III, 1224–1225); that M&M formulated the plan for combatting the

C. I. O. and A. F. L. organizing drives (R. III, 1226); that the plan was executed by TNT and later by Employees Advisory Service, in accordance with M&M's instructions and under the supervision of Southern Californians (R. III, 1226–1227); and that the plan was financed by Southern Californians (R. III, 1227). The Board found that in view of the participation of the institutional parties as agents of the Canvas Companies in the formation of the Independent, they were employers of the Canvas Companies' employees within the meaning of Section 2 (2) of the Act (R. III, 1227); it further found that "the history of the Independent constitutes but one of many similar chapters in the contemporary annals of the coordinated industrial relations activities of the institutional" parties (R. III, 1227). Accordingly, the Board concluded that the Canvas Companies and the institutional parties, acting in concert, had dominated and interfered with the formation and administration of the Independent and had contributed financial and other support to it, thereby interfering with, restraining, and coercing the employees of the Canvas Companies in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (1) and (2) of the Act (R. 1227–1228, 1237).

The Board carefully considered the nature of the remedial order to be issued. It held that since all of the respondents before it, acting in concert, had illegally formed and dominated the Inde-

pendent, it would direct each of them to cease and desist from these unfair labor practices and from the conduct which resulted in the concerted violations of the Act (R. III, 1233). After specifying the nature of the order to be directed against the Canvas Companies, it stated (R. III, 1234–1236):

> Moreover, as we have found, the unfair labor practices committed by the respondents with respect to the employees of the canvas companies were in fact executed as an integral part of a coordinated scheme or plan designed by the institutional respondents as a means of assisting all employers of Southern California in interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed to such employees under the Act. Such coordinated plan, if again applied, will inevitably bring about a further concerted violation of the Act, similar in kind to the unfair labor practices found. Since the institutional respondents have publicly and persistently invited all employers of Southern California to enlist their services in introducing such plan among their employees, it is reasonable to assume, and we find, that the institutional respondents are fully equipped for, and ready to proceed with, the commission of similar unfair labor practices with respect to the employees of other employers, unless ordered to refrain from so doing [citation omitted]. We, therefore, deem it necessary to prevent the commission of such sim-

> ilar unfair labor practices by the institutional respondents, acting in the interest of other employers, and we shall, accordingly, order such respondents to cease and desist from in any other manner, severally, jointly, or in concert with other employers, interfering with the rights guaranteed to employees in Section 7 of the Act. Toward the same end, we shall direct the institutional respondents to notify all persons to whom they have offered their illegal plan that they have in effect abandoned such plan.

Accordingly, the Board's order directed the institutional parties, including M&M, in paragraph 3 (a) (1), to cease and desist from dominating, interfering with, or supporting the Independent or any other labor organization of the employees of any employer; in paragraph 3 (a) (2), to cease and desist from soliciting and collecting funds from any employer to be used for the purpose of interfering with the rights guaranteed in Section 7 of the Act; in paragraph 3 (a) (3), to cease and desist from in any other manner interfering with, restraining, or coercing the employees of any employer in the exercise of the rights guaranteed in Section 7 of the Act; and, in paragraph 3 (b), to send notices by mail to all of its members and those on its mailing list stating that it would not engage in the conduct from which it was ordered to cease and desist (R. III, 1241–1243).

On August 23, 1943, the Board filed in the court below a petition for enforcement of its order (R. III, 1253–1264). M&M was the only one of the nine respondents named in the Board's order which appeared by counsel or filed a brief in opposition to the petition for enforcement (R. XXII, 10065). On August 20, 1945, the court below handed down its opinion (R. XXII, 10064–10080), in which it upheld all of the Board's findings; it nevertheless ordered elimination of paragraphs 3 (a) (2) and 3 (a) (3) of the Board's order which dealt respectively with solicitation of funds by M&M and interference generally with employee rights under the Act (R. XXII, 10080). Judge Stephens dissented from the holding of the majority insofar as it approved "application of the order to persons and organizations not parties in the case" (R. XXII, 10080–10083). A decree in accordance with the court's opinion was entered on August 30, 1945. Petitions for rehearing thereafter filed by the Board and M&M were denied by the Court on December 28, 1945 (R. XXII, 10089–10091). On March 2, 1946, following issuance of this Court's decision in *National Labor Relations Board* v. *Cheney California Lumber Co.,* No. 319, October Term, 1945, the court below entered an order modifying the decree previously entered so as to enforce the order of the Board in full (R. XXII, 10091–10094). On the same day, the decree was accordingly amended (R. XXII, 10083–10089).

ARGUMENT

1. Petitioner's first contention (Pet. 8, 10–11, 20–26) appears to be that the Board improperly admitted in evidence and relied upon collateral facts unrelated to the charges of unfair labor practices before it. It seems to assert that the pleadings limited the issues merely to petitioner's instigation and organization of a company-dominated union among the Canvas Companies' employees and that proof of petitioner's practices among other employees was irrelevent (Pet. 10–11, 22). But in taking this limited view of the pleadings, petitioner wholly ignores Paragraph 7 of the Board's complaint (R. I, 63–65; *supra,* p. 5) which was specifically denied and put in issue by petitioner's answer (R. I, 94–95). Paragraph 7 alleged that petitioner was engaged in forming employer-dominated unions for its members and generally in denying to the employees of its members the rights guaranteed by the Act (R. I, 64). These controverted allegations of the commission of unlawful practices by petitioner not only among the Canvas Companies' employees but among the employees of its members generally provided ample basis for the introduction of evidence to support them. The issues which they created were fully litigated before the Board and were properly considered and resolved. Petitioner's failure to refer to Paragraph 7 of the complaint points up what is in any event clear: that neither the evidence to which petitioner objects nor the Board's findings thereon went beyond the issues

framed by that paragraph and by petitioner's denial thereof. Petitioner unquestionably "understood the issue and was afforded full opportunity to justify" its conduct. *National Labor Relations Board* v. *Mackay Co.*, 304 U. S. 333, 350.[3]

Moreover, in addition to supporting Paragraph 7 of the complaint, the evidence concerning petitioner's unlawful activities among the employees of other employers was relevant to the issue concerning petitioner's participation in the unfair labor practices involving the Canvas Companies' employees since it tended to show, and as the Board subsequently found (*supra*, p. 18) did show, a "design or plan" to engage in such violations.[4] The evidence, therefore, was properly admitted. Furthermore, the propriety of its admission presents no question of general importance requiring review by this Court.

2. Petitioner attacks as unsupported by substantial evidence (Pet. 9–11, 23–26) the Board's

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[3] If petitioner's contention is that the Board is limited to the allegations of the charge or charges which initiated this proceeding (see Pet. 20), its position is plainly without merit. "When a Board complaint issues, the question is only the truth of its accusations. The charge does not even serve the purpose of a pleading." *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18.

[4] Wigmore on Evidence, 3d edition, Sec. 304, Vol. II, p. 202; *New York Mutual Life Insurance Co.* v. *Armstrong*, 117 U. S. 591, 598; *Banning* v. *United States*, 130 F. 2d 330, 334–335 (C. C. A. 6); *United States* v. *Seeman*, 115 F. 2d 371, 373 (C. C. A. 2); *Johnson* v. *United States*, 82 F. 2d 500, 504–505 (C. C. A. 6); *Wood* v. *United States*, 16 Pet. 342, 359–361.

findings that petitioner engaged in unfair labor practices, that it was an "employer" within the meaning of the Act, and that petitioner's unfair labor practices were executed as part of a coordinated scheme or plan of all the institutional parties to coerce employees of all employers in Southern California in the exercise of their rights under the Act. The evidence summarized in the Statement (*supra*, pp. 4–20) affords full support for the challenged findings. Petitioner's bare allegation (Pet. 10, 25) that the Board admitted hearsay and other incompetent evidence is not accompanied by "appropriate references to the record" (*Furness, Withy and Co.* v. *Yang-Tsze Insurance Association*, 242 U. S. 430, 434); in any event, as the court below pointed out, "ample evidence remains to support the Board's findings" (R. XXII, 10077).

3. Petitioner contends (Pet. 8, 12, 15–20) that the Board's remedial order is too broad because it bars petitioner from interfering with and coercing not only the employees of the Canvas Companies but also the employees of any other employer. The remedy was entirely appropriate upon the record made in this case and was formulated only after careful consideration by both the Trial Examiner (R. I, 451–456, 470–475) and the Board (R. III, 1233–1237) of the scope and nature of petitioner's unlawful conduct. As the Board made clear in its findings (R. III, 1234–1236; *supra*, pp. 18–19), petitioner's unfair labor practices were not isolated acts limited

to the employees of the Canvas Companies but were "an integral part of a coordinated scheme or plan designed by the institutional respondents as a means of assisting all employers of Southern California in interfering with, restraining, and coercing their employees * * *." The Board further found (*ibid.*) that petitioner stood ready to carry out the coordinated plan with respect to other employees unless restrained from so doing. Accordingly the Board, to effectuate the policies of the Act, issued its order to prevent petitioner from carrying out this unlawful plan. The court below properly sustained the order for, as it pointed out (R. XXII, 10080):

> Here there was a general attitude and conduct which the Board could infer evidenced an intent to nullify the National Labor Relations Act for all employers and employees in Southern California.

The Board's action in restraining continuance of the coordinated plan of violations with respect to other employees is well within the principles established by this Court. "The relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress." *National Labor Relations Board* v. *Mackay Co.*, 304 U. S. 333, 348. And as this Court said in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 436–437:

> The breadth of the order, like the injunction of a court, must depend upon the cir-

> cumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past.

It further held that where "the record disclosed persistent attempts by varying methods to interfere with the right of self-organization in circumstances from which the Board or the court found or could have found the threat of continuing and varying efforts to attain the same end in the future," the order could be drawn broadly enough to halt such efforts (312 U. S., at 437–438). Here, the Board found on ample evidence that such threats did exist and that (R. III, 1235):

> We, therefore, deem it necessary to prevent the commission of such similar unfair labor practices by the institutional respondents, acting in the interest of other employers, and we shall, accordingly, order such respondents to cease and desist from in any other manner, severally, jointly, or in concert with other employers, interfering with the rights guaranteed to employees in Section 7 of the Act.

On the record in this case we think it clear that this finding and the order based thereon were a proper exercise of the Board's "informed discretion" with respect to remedial orders. *Phelps*

Dodge Corp. v. *National Labor Relations Board,* 313 U. S. 177, 195.[5]

Petitioner further objects (Pet. 9, 19) to the so-called omnibus provision enjoining it from any violations of the rights guaranteed in Section 7 of the Act. This type of order was upheld by this Court in *National Labor Relations Board* v. *Cheney California Lumber Co.,* No. 319, October Term, 1945, decided February 25, 1946, upon violations less extensive than those disclosed upon the record herein. Under the principles of the *Cheney* and *Express Publishing* cases, *supra,* the order is amply justified.

4. Petitioner attacks (Pet. 9, 12, 27–29), as contrary to the Constitutional guarantee of free speech, the provision of the Board's order (R. III, 1242) forbidding petitioner to solicit and collect funds to be used for the purpose of interfering with the rights guaranteed in Section 7 of the Act. Petitioner's reliance on the First Amendment is difficult to understand for no question of free speech is remotely involved. The Board's order in no way affects the expression of opinion. It does no more than restrain petitioner from the concrete act of soliciting and collecting funds to be used to finance violations of the Act.

[5] The decision below is in accord with an earlier decision of the same court enforcing a similar order over the objection of the organization there involved. *National Labor Relations Board* v. *Holtville Ice & Cold Storage Co.*, 148 F. 2d 168 (C. C. A. 9), enforcing 51 N. L. R. B. 596. There are no contrary decisions.

Petitioner is not forbidden to solicit funds to be used for purposes protected by the First Amendment or for other lawful purposes. It is only restrained from soliciting and using funds for the unlawful purpose of violating the Act. Just as coercion in general is not shielded by the First Amendment (*Thomas* v. *Collins,* 323 U. S. 516, 537–538), so solicitation of funds to be used for coercion is likewise unprotected. As the court below pointed out (R. XXII, 10074), petitioner, throughout this litigation, has used the term "free speech" as a "euphemistic slogan" to conceal its conspiracy to violate the Act. Its present reliance on the First Amendment is of similar character.

Equally groundless is petitioner's objection to the order based on "due process" (Pet. 11, 12, 29). The order does not restrain employers from contributing money to petitioner for lawful purposes.

CONCLUSION

The decision of the court below is correct and there is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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JULY 1946.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly * * *

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published

by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in

the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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